

City Signal's entire investment in the proposed project. City Signal's business plan, it should be noted, calls for it to provide telecommunications services "through various municipalities in Northeast Ohio."²⁷ Assuming there is a cost increase for City Signal to put its lines underground in portions of the three cities in question, the appropriate analysis (in determining whether there is an effective prohibition to providing service) would be to compare those increased costs to City Signal's anticipated costs involved in implementing its *overall* business plan for Northeast Ohio.²⁸ If (for example) City Signal's plan is to install thirty million dollars of new facilities in Northeast Ohio, a \$20,000 increase in costs is clearly not a "prohibition on entry."²⁹ City Signal, of course, has provided no information on what its business plan is in terms of municipalities to be served, numbers of miles of line involved or (most importantly) projected revenues, expenses and how a cost increase relates to such figures.

City Signal has simply failed to provide sufficient information on which the Commission can make an informed decision as to whether there is a substantial cost increase and, if so, whether it is or is not an effective prohibition on entry.

²⁷Cleveland Heights Petition at Paragraph 2. Concerned Municipalities have attached as Exhibit A a map of much (not all) of Northeast Ohio which extends (roughly) 100 miles east to west and a comparable distance north to south. It encompasses all of the Cleveland, Akron and Youngstown Metropolitan Areas which have a combined population of approximately 3.5 million.

²⁸Alternatively, if City Signal is, in fact, operating predominantly as a reseller or is installing very few capital facilities, a more appropriate comparison for any increased cost may be against City Signal's projected revenue stream.

²⁹Assuming (as is often the case) that such companies borrow money at a certain number of points above a prime rate, any significant change in the prime rate is likely to lead to economic consequences far greater than the cost of undergrounding versus aerial construction.

C. The Petitions Come Within the Section 253(c) Right of Way Management Safe Harbor.

Section 253(c) provides a “safe harbor” for matters otherwise falling within the scope of Section 253(a). Thus, Section 253(c) states that “nothing in this Section affects the authority of a State or local government to manage the public rights-of-way . . .”, subject to certain restrictions (discussed below).³⁰

“Managing the public rights of way” includes the determination of where in the public rights of way a line goes: On the north side of the highway or the south? If underground, how far underground and where laterally within the rights of way?³¹ As the Commission may appreciate, many items affect the location decision, including the presence and location of existing lines and facilities, engineering standards, code requirements, separation distances from other utilities and the like. Other factors include public safety (large numbers of wires on poles sometimes being a hazard in urban areas), aesthetic considerations (is the area a historic area or eligible for inclusion in a

³⁰It should be noted that the statute leaves no room for an “implied” power of preemption. Section 601(c) of the Federal Telecommunications Act of 1996, which added Section 253, expressly states:

This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.

See Federal Telecommunications Act of 1996, Pub. L. 104-104, Title VI, § 601(c) (Feb. 8, 1996), 110 Stat. 143.

³¹For example, if a line is placed underground, does it go more or less in the middle of the street under the paved portion of the right of way, under the sidewalk, or on a grassy strip beside the sidewalks. The last is often more preferable as it least disturbs the traveled portion of the right of way and is readily accessible.

National Register of Historic Places), business development and the like. Managing the rights of way thus includes a determination of where in the right of way a line may go.

This conclusion is reinforced by the legislative history of Section 253. In the Senate floor debates on what is now Section 253(c), Senator Feinstein (one of the “authors” of Section 253, as described above) stated that it included “requir[ing] a company to place its facilities underground, rather than overhead, consistent with the requirements imposed on other utility companies.”³²

The plain language of Section 253 *and* its legislative history thus confirms that undergrounding of utility lines is one of the matters expressly included within Section 253(c), and is therefore reserved to the local communities.

D. The Undergrounding Policy is Competitively Neutral and Nondiscriminatory.

The undergrounding policy being implemented by the cities is competitively neutral and nondiscriminatory because it applies to all new lines. As the City of Cleveland Heights pointed out, the only aerial telecommunications type lines in the City are those of the local phone and cable company which have been in place for over twenty years.³³ The only other new provider which has asked to construct lines in the areas in question has agreed to conform to the City’s requirement and place its lines underground.³⁴ The City’s “treatment of City Signal’s request to use the City’s right-of-way has been non-discriminatory and competitively neutral because all telecommunications

³²141 Congressional Record S8172 (Daily Edition, June 12, 1995)(Statement of Senator Feinstein, quoting a letter from the Office of the City Attorney, City and County of San Francisco).

³³Gibbon Affidavit at 11; Cleveland Heights Opposition at 2.

³⁴Cleveland Heights Opposition at Paragraph 2; Gibbon Affidavit at Paragraph 12.

providers requesting authorization to use the City's rights-of-way are treated in a similar manner with the same requirements."³⁵

The fundamental point which the City is making – and which is important to Concerned Municipalities – is that states and municipalities must have the ability over time to change the laws applicable to telecommunications providers. Stated otherwise, City Signal's argument is another way of making the telecommunications provider's argument that no obligation can be imposed on a new provider that was not imposed on the incumbent when it built its facilities. In other words, if certain legal requirements applied to the local Bell company when it built its system a century ago, then no greater requirements can be imposed on a new provider in the 21st century.

To state this proposition is to show how untenable City Signal's argument is. Our telephone companies date from the latter quarter of the nineteenth century. Much of our current telecommunications systems were built (although later rejuvenated and upgraded) between the time of the Spanish American War and the First World War. The logical conclusion of City Signal's argument is that state and local laws applicable to telephone companies must be frozen at the time the incumbent system was installed, and that no greater requirements can be imposed on the provider.³⁶ Such a conclusion is obviously nonsense.

³⁵Cleveland Heights Opposition at Page 1.

³⁶This attempt to "freeze" state and local regulation at the time the incumbent provider installed its lines is an argument that has been made to this Commission by various providers. For example, in CC Docket 97-219, Chibardun Telephone Cooperative Inc. and CTC Telecom Inc. ("Chibardun") filed a Petition for Preemption under Section 253 relating to ordinances, fees and right of way practices of the City of Rice Lake, Wisconsin. At issue, among other things, were a new telecommunications ordinance and license agreement which would be applicable to Chibardun if it provided telecommunications service in Rice Lake. Among many other points, Chibardun objected to the City's new telecommunications ordinance applying

The key word in this analysis is “discrimination.” Its meaning has been the subject of a number of cases brought under Section 253. One court, for example, noted that Black’s Law Dictionary had defined the term as “a failure to treat all persons equally when no reasonable distinction can be found between those favored and those not favored.” Cablevision of Boston, Inc. v. Public Improvement Commission of the City of Boston, et. al., 38 F. Supp. 2d. 46, 59 (D. Mass. 1999) aff’d, 184 F.2d 88 (1st Cir. 1999) (citing Black’s Law Dictionary 420 (5th ed. 1979)). Another court emphasized that the term “discrimination” does not require the telecommunications providers be necessarily treated “identically.” ECG New York, Inc. et. al. v. City of White Plains, New York, 2000 U.S. Dist. LEXIS 18465 (S.D.N.Y. 2000), at *50. The term permits cities to make distinctions based on valid considerations. Id., citing Cablevision of Boston, supra, 184 F. 3d. at 103. It does not require strict equality. TCG Detroit v. City of Dearborn, 16 F. Supp. 2d. 785, 792 (E.D. Mich. 1998), Aff’d 206 F.3d 618 (6th Cir 2000). Nor does it require cities to ignore significant distinctions between providers. AT&T Communications of the Southwest, Inc. v. City of Dallas, 8 F. 3d 582,

to it because it has “not been imposed upon GTE, Marcus Cable or other utilities when they entered the Rice Lake market,” May 23 Letter to City of Rice Lake (Exhibit D to Petition for Preemption), at 2 (emphasis supplied).

Chibardun repeatedly criticized the license agreement and new ordinance conditions and costs on the grounds that they “are not” (and have never been) imposed upon the existing Rice Lake Utilities,” Petition at 3. And Chibardun in its request for relief asked the Commission to preempt the City from enforcing “future right of way ordinance placing larger fees and more onerous conditions and restrictions upon entities seeking to furnish competitive telecommunications in Rice Lake [that have been imposed on existing providers].” Petition at 24-25. Various industry commenters supported Chibardun’s claim. Thus, MCI Telecommunications Corporation asserted that the license agreement at issue was invalid “because it imposes far more onerous and expensive obligations upon new entrants than the existing Rice Lake Code imposes upon either GTE or Marcus.” Comments of Marcus, MCI Telecommunications Corporation, at 2. Unfortunately, no order was ever entered in that case, the parties having reached a settlement on the matter.

593 (N.D. Tex 1998). In fact, Congress considered, but eventually rejected, a proposed “parity” provision to Section 253 that would have made it illegal for cities to impose different fees on different telecommunications providers. During the Congressional hearings on amendments to the Act, Representative Stupak criticized the proposed provision, stating:

Local governments must be able to distinguish between different telecommunication providers. The way the (parity) amendment is now, they cannot make that distinction. For example, if a company plans to run 100 miles of trenching in our streets and wire to all parts of the cities, it imposes a different burden on the right-of-way than a company that just wants to string a wire across two streets to a couple of buildings. The [parity] amendment states that local governments would have to charge the same fee to every company, regardless of how much or how little they use the right-of-way or rip up our streets.

TCG New York, Inc., supra, at *51, citing 141 Cong. Rec. H8427 (August 4, 1995). The present version of Section 253(c) represents an express rejection by Congress of the proposed “parity” concept.

It is clear that the concepts of “competitive neutrality” (used in both Section 253(b) and (c)) and “nondiscrimination” (used only in Section 253(c)) must, of necessity, include the ability to make reasonable classifications. Here, the classification that is fundamental is based on time: Going forward, new requirements apply.

As the preceding examples indicate, if the courts or Commission adopt any other standard, they will have played into the provider’s hands. They will have frozen state and local laws applicable to telecommunications companies to those in effect decades or a century ago. Any such result is untenable, is contrary to the Act, and would be constitutionally suspect under the Supreme Court’s increasingly expansive reading of the 10th Amendment and narrowed reading of the Commerce Clause, described above.

IV. CONCLUSION

For the reasons set forth above, the three Petitions for Declaratory Ruling in CS Dockets 00-253, 00-254 and 00-255 should be dismissed without further action by the Commission.

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CERTIFICATE OF SERVICE

I, Kim Van Dyke, a secretary at the law firm of Varnum, Riddering, Schmidt & Howlett LLP, hereby certify that on this 29th day of January, 2001, I sent by first class mail, postage prepaid, a copy of the foregoing comments to the persons listed below.

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EXHIBIT A-MAP OF NORTHEAST OHIO

(attached)

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